No. 95-1653

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

KATHY ST. HILAIRE, Individually, and as Executrix for the Estate of Philip St. Hilaire,

Petitioner,

vs.

CITY OF LACONIA, Laconia, New Hampshire; TOWN OF BELMONT, Belmont, New Hampshire; COUNTY OF BELKNAP, Laconia, New Hampshire; DET. DAVID A. GUNTER, of the Laconia Police Department, in his individual and official capacity; SGT. BRIAN LOANES, of the Town of Belmont, in his individual and official capacity; SGT. DAVID NIELSEN, of the Town of Belmont, in his individual and official capacity; DEPUTY SHERIFF ROBERT DUPUIS, JR., of the Belknap County Sheriff's Department, in his individual and official capacity; DEPUTY SHERIFF DANIEL COLLIS, of the Belknap County Sheriff's Department, in his individual and official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DEPUTY SHERIFF ROBERT DUPUIS, JR., DEPUTY SHERIFF DANIEL COLLIS AND COUNTY OF BELKNAP

CHRISTINE DESMARAIS-GORDON
WADLEIGH, STARR, PETERS,
DUNN & CHIESA
95 Market Street
Manchester, NH 03101
(603) 669-4140

DONALD J. PERRAULT
Counsel of Record
WADLEIGH, STARR, PETERS,
DUNN & CHIESA
95 Market Street
Manchester, NH 03101
(603) 669-4140

Attorneys for Respondents Deputy Sheriff Robert Dupuis, Jr., Deputy Sheriff Daniel Collis and County of Belknap

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the First Circuit properly analyzed the issue of qualified immunity when it held that, if at the time the police acted, they violated no clearly established constitutional right, the officers were entitled to qualified immunity.

A. Whether the lower courts properly decided that no "clearly established" right existed and then concluded its inquiry.

B. Whether the lower courts erred by narrowly construing what the "clearly established" right was.

II. Whether the First Circuit Court of Appeals correctly held that since the "knock and announce" requirement was not "clearly established" at the time of the alleged conduct, the issue of whether Respondents failed to identify themselves was immaterial as a matter of law.

A. The lower court did not err in holding that the factual dispute over whether adequate notice was given was immaterial as a matter of law.

III. Whether the Petition for Writ of Certiorari should be denied as to the Respondents Dupuis, Collis and the County of Belknap as they did not use excessive or deadly force.

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The opinion of the United States Court of Appeals for the First Circuit is cited as Kathy St. Hilaire, etc., Plaintiff-Appellant v. City of Laconia, et al., Defendants-Appellees, 71 F.3d 20 (1995).

The opinion of the United States District Court for the District of New Hampshire is cited as Kathy St. Hilaire, etc., Plaintiff v. City of Laconia, et al., Defendants, 885 F. Supp. 349 (1995).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment IV:

> AMENDMENT IV — SEARCH AND SEIZURES
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C.§ 1343(A)(3)(4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of a right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

A. Factual Background

On April 27, 1990, Deputy Sheriff Robert Dupuis of the Belknap County Sheriff's Department presented a search warrant application and affidavit to the Laconia District Court for authorization to search the person of Philip St. Hilaire and the premises of an auto salvage business called Laconia Auto Wrecking. The application specified that the searches would seek the controlled drug cocaine, records or ledgers of drug sales, monies associated with the drug distribution business, firearms, drug distribution paraphernalia as well as other items associated with drug distribution.

The Affidavit in Support of the Search Warrant Application, signed and sworn to by Deputy Dupuis, described two controlled purchases of the controlled drug cocaine by a confidential informant who had previously purchased the drug from Philip St. Hilaire at the Laconia Auto Wrecking premises in April, 1990. A Justice of the Laconia District Court issued the search warrant

for Philip St. Hilaire and the premises of Laconia Auto Wrecking on April 27, 1990.

At or about 5:00 p.m. on August 27, 1990, members of the Belknap County Sheriff's Department, the Laconia Police Department and the Belmont Police Department convened at the Belknap County Sheriff's office to prepare for the joint execution of the search warrant. During this meeting a plan for the drug search was developed. A general discussion took place concerning the layout of the premises to be searched and the probability that Philip St. Hilaire would be armed and should be considered dangerous. The officers were aware that St. Hilaire carried a loaded gun on his person and had been known to keep a revolver under the counter at St. Hilaires' place of business at Laconia Auto Wrecking. Dupuis related a recent incident where an individual had stooped to pick up St. Hilaire's money bag when it dropped and Mr. St. Hilaire had stuck a gun to the individual's head. In addition, the officers discussed the exterior reflective glass at Laconia Auto Wrecking. During the meeting, the officers advised that the reflective glass on the front of Laconia Auto Wrecking made it very difficult for people to see inside but very easy for people inside to see outside.

As a result of the meeting, Sergeants Nielsen and Loanes of the Belmont Police Department, and Deputy Dupuis of the Belknap County Sheriff's Department were assigned to secure Philip St. Hilaire and to conduct the search of his person and the premises at Laconia Auto Wrecking. Detective Gunter was to be available with his drug dog, Lux, in order to detect drugs during the conduct of the search. Deputy Sheriff Daniel Collis was assigned to a position across the street from Laconia Auto Wrecking and was in radio communication with Deputy Dupuis while monitoring activity in front of Laconia Auto Wrecking on the evening of April 27, 1990. During earlier surveillance, Deputy Collis had monitored the unimpeded flow of persons in

and out the front door of the Laconia Auto Wrecking premises. However, shortly after his arrival at the scene, on April 27, 1990, Deputy Collis determined that the door to the building was locked because he observed a person approach the door and shake it before someone appeared to unlock the door to allow that individual entrance. Collis radioed this information to the search warrant team. Detective Gunter joined the team behind Laconia Auto Wrecking due to Dupuis' desire for additional support when it became known that the front door to Laconia Auto Wrecking was locked. As the team was discussing the information received regarding the locked door, Deputy Collis reported that Philip St. Hilaire was exiting the building, locking the front of his business and heading towards his vehicle in the parking lot.

Hoping to intercept St. Hilaire before he entered his vehicle, Deputy Dupuis gave the command "let's go." As St. Hilaire approached his vehicle, members of the team ran towards the parking lot from their positions around the side of the Laconia Auto Wrecking building. The officers approached St. Hilaire in the following order: Detective Gunter first, then Deputy Dupuis, then Sergeant Loanes and then Sergeant Nielsen. As the officers approached St. Hilaire; who by that time had seated himself on the front seat of his vehicle, the officers yelled "Phil!, Phil!, Police!" and "Freeze!, Police!" The officers yelled loud enough so that Deputy Collis could hear shouts of "Police" while he ran across Route 106 in the direction of St. Hilaire's vehicle. In addition, David B. McNeil, a passing motorist driving by Laconia Auto Wrecking with his windows rolled down, was able to hear "Freeze".

Detective Gunter approached the passenger side of the vehicle, having taken his badge from his belt and carrying it outstretched in front of him in his left hand. He was carrying his firearm in his right hand. At that time Gunter was wearing a

bright red t-shirt, jeans and a black bullet proof vest. Detective Gunter observed St. Hilaire turn as he shouted "Phil!, Phil!, Police!". St. Hilaire made eye contact with Gunter through the right rear window. Gunter observed St. Hilaire reach with his right hand to his right hip and put his hand on a .45 caliber automatic revolver. St. Hilaire then proceeded to draw the revolver out of his holster. At that moment Gunter fired a shot, without aiming, at St. Hilaire. At the time of the shooting, Gunter was holding his badge in his left hand.

After St. Hilaire was shot, Chief McCarty of the Belmont Police Department, who arrived shortly thereafter, removed Philip St. Hilaire's weapon from the front seat of the vehicle where it lay next to him. Sergeant Nielsen observed that St. Hilaire's right hand was on top of the gun which was on the seat at St. Hilaire's right. Sergeant Nielsen found an empty holster consistent with the weapon that was taken from Mr. St. Hilaire on St. Hilaire's right hip. He also found a aqua blue bag from which the state police later recovered three quarters of an ounce of cocaine with a street value of approximately $2,200 in St. Hilaire's jacket.

B. Procedural History

The Petitioner, Kathy St. Hilaire, is the Executrix for the Estate of Philip St. Hilaire, who filed suit in the United States District Court for the District of New Hampshire. In the complaint, the petitioner claimed that the defendants violated Philip St. Hilaire's Fourth Amendment rights by allegedly engaging in unreasonable conduct in conducting the search pursuant to the search warrant. The basis of her complaints against the respondent Deputy Sheriffs Robert Dupuis, Daniel Collis and the Belknap County Sheriff's Department were that they negligently created circumstances leading to the use of deadly force against Philip St. Hilaire. As neither Dupuis nor

Collis used any force against Philip St. Hilaire, the excessive force claims cannot pertain to the these respondents.

The Respondents moved for Summary Judgment at the District Court level on the basis that they were entitled to qualified immunity pursuant to this Court's ruling in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The District Court granted Summary Judgment in favor of the respondents pursuant to 42 U.S.C. § 1983; finding that the officers were entitled to qualified immunity as to all federal counts. The District Court held that the claims against Dupuis and Collis, which related to the negligent creation of circumstances leading to the use of deadly force, did not raise claims of a violation of rights which were "clearly established when the defendants acted" and accordingly the respondents were entitled to qualified immunity. The District Court properly applied the qualified immunity analysis set forth in *Sullivan v. Horta,* 4 F. 3d 2, 13 (1st Cir. 1993).

Petitioner subsequently appealed to the United States Court of Appeals for the First Circuit on somewhat different grounds. At the First Circuit, the petitioner focused her Fourth Amendment claim on the theory that the respondents *as a group* were required to provide adequate notice of their identity and purpose at the time that they approached Philip St. Hilaire. In that argument, the petitioner relied to a significant extent upon this Court's recent decision in *Wilson v. Arkansas,* 115 S. Ct. 1914 (1995). The petitioners were successful in responding that neither of Petitioner's theories against the defendants; the negligent creation of circumstances leading to the likelihood of serious injury or the so-called "knock and announce rule", were clearly established at the time that the conduct in question took place and therefore the respondents were entitled to qualified immunity.

The First Circuit, in sustaining the District Court,

summarized petitioner's theory as follows: if the police had properly *identified* themselves, St. Hilaire would have known they were the police and would not have made the movement in the direction of his gun which led to his shooting. The First Circuit concluded that this "right" to be notified of a police officer's identity and purpose was not "clearly established" at the time of the incident and therefore the respondents were entitled to qualified immunity. The Court specifically held that the right was not clearly established until, at the earliest, this Court's decision of *Wilson v. Arkansas, infra,* in 1995 and consequently was clearly not established in 1990, at the time that the conduct in this case took place.

Respondent's oppose the Petition for Writ of Certiorari on the basis that Summary Judgment was appropriate in this case and was properly granted and affirmed by the lower courts. Both the United States District Court and the First Circuit Court of Appeals properly applied the qualified immunity analysis and held, *as a matter of law* that the respondents were entitled to qualified immunity.

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT PROPERLY ANALYZED THE ISSUE OF QUALIFIED IMMUNITY AND HELD THAT, IF AT THE TIME THE POLICE ACTED, THEY VIOLATED NO CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT, THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY.

Petitioner asserts that one of the reasons for granting the Writ of Certiorari in this case arises from the District Court and First Circuit's refusal to determine a factual issue, *i.e.*, whether the officer's conduct was reasonable under the Fourth Amendment. Petitioner has relied entirely upon cases wherein the court was called upon to evaluate the *facts* for a substantive reasonableness inquiry under the Fourth Amendment. None of these cases involved the legal issue of qualified immunity. *See Tennessee v. Garner*, 470 U.S. 1 (1985) and *Graham v. Connors*, 490 U.S. 386 (1989). Petitioner's efforts to create a requirement for a reasonableness analysis in all cases involving a Fourth Amendment challenge flies in the face of this Court's earlier pronouncements on the issue of qualified immunity and provides no valid basis for the granting of certiorari in this matter.

Law enforcement officers are entitled to qualified immunity from suit in civil actions under 42 U.S.C. § 1983 as long as their conduct "did not violate clearly established statutory or constitutional rights of which a reasonable [police officer] would have known." *Harlow*, 457 U.S. at 818. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The doctrine of qualified immunity protects officials

unless "the law clearly proscribed the actions" they took. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

A. The lower courts properly decided that no "clearly established" right existed and concluded its inquiry.

The appellate assessment of qualified immunity is divided into two analytic components. First, if the right asserted by the plaintiff was "clearly established" at the time of its alleged violation, the court is required to assume that the right was recognized by the defendant official. *Harlow*, 475 U.S. at 818. Second, the court will deny immunity if a reasonable official situated in the same circumstances should have understood that the challenged conduct violated that established right. *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). The qualified immunity defense was created, in part, so that officials might reasonably anticipate when their conduct may give rise to liability for damages. *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

The first prong of the proper analysis to determine whether an individual is entitled to qualified immunity requires a court to determine, as a matter of law, whether the right the official is alleged to have violated has been "clearly established." *Anderson*, 483 U.S. at 640. *See also, Mitchell*, 472 U.S. at 525-526 (recognizing a party's entitlement not to stand trial or face other burdens of litigation pending the resolution of the essentially legal question as to whether the conduct of which the plaintiff complains violated clearly established law).

If the trial court finds that the constitutional right allegedly violated was not clearly established at the time of the conduct, the official is then entitled to qualified immunity. *Siegert v. Gilly*, 500 U.S. 226, 234-235 (1991). Contrary to the arguments raised by petitioner, the District Court is not authorized to go on to an inquiry into the reasonableness of the officer's actions if it

has concluded that the "right" was not clearly established at the time of the alleged violation. A reasonable official is entitled to qualified immunity if the "right" was not so established so that he or she could anticipate that his or her conduct would give rise to liability for damages. *Davis,* 468 U.S. at 195.

In *Siegert,* this Court held that, because plaintiff's claim failed to allege a violation of any constitutional rights, it should be dismissed. *Siegert,* 500 U.S. at 227. In *Siegert,* the plaintiff sought damages against the defendant for allegedly publishing a defamatory statement maliciously, in bad faith and in violation of the due process clause of the Fifth Amendment. The District Court had found that the factual allegations were sufficient to state violations of a clearly established constitutional right and allowed discovery to proceed on a limited basis. The defendant appealed and the Circuit Court reversed and remanded with instructions that the case be dismissed. After noting that the purpose of the qualified immunity defense is to spare a defendant from unwarranted liability and the demands of a lengthy and expensive lawsuit, the Court stated that "this case demonstrates the desirability of this approach to a claim of immunity, for Siegert failed not only to allege the violation of a constitutional right that was clearly established at the time of Gilly's actions, but also to establish the violation of any constitutional right at all." *Siegert,* 500 U.S. at 227.

The District Court and the First Circuit Court of Appeals in the instant case appear to have followed the direct guidance derived from this Court's decision in *Siegert.* Both courts evaluated the petitioner's claims and concluded that a "clearly established" constitutional right to have officers identify themselves and their purpose did not exist in 1990. Once the District and Circuit Court found that no "clearly established" right existed it properly concluded its analysis and dismissed the petitioner's claims on the basis of qualified immunity. *See*

Mitchell, 472 U.S. at 526; *Horta*, 4 F.3d at 13 (1st Cir. 1993); *Harper v. Harris County, Texas*, 21 F.3d 597 (5th Cir. 1995); *Jones by Jones v. Webb*, 45 F.3d 178 (7th Cir. 1995); *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995); *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991).

B. The lower courts did not err by narrowly construing what the "clearly established" right was.

Petitioner alleges that the lower courts erred by finding that the clearly established right was not the broad right to be free from unreasonable search and seizures but rather the narrower right to have police officers identify themselves and their purpose when enforcing a search warrant. Petitioner's view of the court's function in identifying the clearly established right is erroneous and inconsistent with well-settled precedent.

The precedent for the Court's evaluation was first set in *Anderson v. Creighton, supra*, where the plaintiff alleged that the "clearly established" right involved in his case was the right to be protected from warrantless searches of his home unless the officers had probable cause and there were exigent circumstances. *Anderson*, 483 U.S. at 638. This Court, in analyzing the plaintiff's view that the "right" must be interpreted broadly, noted that:

> the operation of the standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a

> clearly established right. Much the same could be said of any other Constitutional or statutory violation.

Anderson, 483 U.S. at 639.

The Court then went on to state that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. The Court has consistently upheld the requirement that a plaintiff's constitutional claims, for purposes of the qualified immunity analysis, must be specific to the facts of the particular case. For example, in *Elder v. Holloway*, 127 L. Ed. 2d 344 (1994), the plaintiff had alleged that his warrantless arrest violated his "clearly established" right to be free from unreasonable seizures under the Fourth Amendment. *Elder*, 127 L. Ed. 2d at 348. The District Court evaluated the plaintiff's claims under a case specific analysis, *i.e.* whether the warrant requirement applied when the officers surrounded his house and requested that he come out of the house and surrender. *Id.* at 349. The District Court found that "for that scenario, the one presented here" no controlling case law existed. *Id.*

Similarly, in *Mitchell*, 472 U.S. at 515, the respondent, Forsyth, had alleged that the use of warrantless wiretaps violated his Fourth Amendment rights. The Court, in evaluating whether Mitchell was entitled to qualified immunity, determined that the plaintiff was alleging a more specific claim; the right to be free from an Attorney General's use of warrantless electronic surveillance to gather intelligence for national security purposes. *Mitchell*, 472 U.S. at 533-535. The Court held that, although Congress had passed legislation limiting the use of

warrantless wiretaps by state and federal law enforcement agencies, no restrictions had been put on the power of the President or other Executive authority to engage in the same conduct and therefore there was no "clearly established" right to be free from such conduct at the time of the wiretapping. *Id.* at 535.

A proper qualified immunity analysis therefore, requires the lower court to evaluate the specific facts of the case to determine the "clearly established" constitutional right. In the instant case, the Circuit Court properly narrowed the focus from a generic Fourth Amendment unreasonable search and seizure claim to the claim actually alleged by the petitioner here, *i.e.*, the appropriateness of the failure of plain clothes police officers to announce their identity and purpose, while approaching the petitioner in his vehicle pursuant to a valid warrant. Under both *Mitchell* and *Elder,* the First Circuit's decision to properly restrict the scope of its review of petitioner's claims is neither error nor does it establish a basis for granting a Writ of Certiorari in this case.

II.

THE FIRST CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT SINCE THE "KNOCK AND ANNOUNCE" REQUIREMENT WAS NOT "CLEARLY ESTABLISHED" AT THE TIME OF THE ALLEGED CONDUCT, THE ISSUE OF WHETHER RESPONDENTS FAILED TO IDENTIFY THEMSELVES WAS IMMATERIAL AS A MATTER OF LAW.

The Fourth Amendment to the Constitution protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, [which] shall not be violated and no warrant shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or persons to be seized." U.S. Const. amend. IV.

Petitioner alleges that the Fourth Amendment prohibition against "unreasonable searches" would have required the respondents in this case to identify themselves as police officers and state their purpose prior to apprehending St. Hilaire in his car. Petitioner's argument below was based upon this Court's decision in *Wilson v. Arkansas,* 115 S. Ct. 1914 in which this Court held that the reasonableness of the search of a *dwelling* depended, in part, on whether law enforcement officers announced their presence and authority prior to entering; thus incorporating the common law "knock and announce" rule into the Fourth Amendment (emphasis added). Petitioner's reliance upon *Wilson v. Arkansas* is misguided in a number of ways. First, the decision in *Wilson* focused upon the importance of privacy interest in one's dwelling place. The *Wilson* opinion traced the common law protection of a man's home as his "castle of defence and asylum" back to Blackstone's Commentary and such old English common law precedents as *Semayne's Case,* 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603). *Wilson,* 115 S. Ct. at 1916. This Court has recognized that one's right to privacy in one's home is a "precious" right. *Miller v. The United States,* 357 U.S. 301, 307 (1958).

The First Circuit, however, properly recognized the distinction between the privacy interest in a person's home and a person's car. Moreover this Court held in *Cardwell v. Lewis,* 417 U.S. 583 (1974) that "one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view." *Cardwell,* 417 U.S. at 590. More recently, this

Court held, in *California v. Carney*, 471 U.S. 386 (1985), that the "reduced expectations of privacy derived not from the fact that the area to be searched is in plain view but from the pervasive regulation of vehicles capable of traveling on the public highways." *Carney*, 471 U.S. at 391.

Thus, it would seem that petitioner bears the burden of establishing that the holding handed down by this Court in *Wilson;* relating to the so called "knock and announce" rule, has any relevance to the conduct of police officers in seizing an individual sitting in his vehicle for whom they have a valid warrant. *See Elder,* 127 L. Ed. 2d at 350. In an attempt to meet that burden, St. Hilaire bases her argument on a number of cases and statutes which purportedly stand for the proposition that the "knock and announce" rule was a clearly established right. *See* Petitioner's references to 18 U.S.C. § 3109 (limiting the breaking of doors or windows of a *house* to execute a search warrant); *Miller v. United States,* 357 U.S. 301 (1958) (forced entry into a *home*); *Sabbath v. United States,* 391 U.S. 585 (1968) (forced entry into an *apartment*); *Ker v. California,* 374 U.S. 23 (1963) (intrusion onto the privacy rights of the occupants of a *dwelling*); *Weeks v. United States,* 232 U.S. 383, 393 (1914) (seizure of personal paper from a person's *home* in his absence) (emphasis added). None of these cases, however, applied the "knock and announce" rule to circumstances which did not involve a person's home or dwelling. As a result, St. Hilaire has failed to provide any authority from which the lower courts could find that the "knock and announce" rule for searches and seizures applies beyond a person's home or dwelling. As petitioner's claim fails to state a violation of clearly established law, the respondents are entitled to qualified immunity. *Mitchell v. Forsyth,* 472 U.S. at 526.

The Petitioner is also misguided in her attempts to rely on this Court's opinion in *Wilson* because, to the extent that the

knock and announce rule creates a "clearly established" right under the present case, this right was not established until 1995, the date of this Court's opinion in that case. The Court has rejected the retroactive application of cases creating a "clearly established" right to earlier conduct. *Mitchell,* 472 U.S. at 535.

In *Mitchell,* the plaintiff had alleged a violation of the Fourth Amendment as a consequence of the defendant's use of a warrantless wiretap for purposes of national security. The wiretapping occurred from November, 1970 through January, 1971. At the time the wiretapping occurred, a conflict existed among federal district and circuit courts as to whether the Attorney General could legally authorize warrantless wiretaps. *Mitchell,* 472 U.S. at 533. One year after the wiretapping, this Court ruled, in *United States v. United States District Court,* 407 U.S. 297 (1972) (Keith), that the Fourth Amendment does not permit the use of warrantless wiretaps in cases involving domestic threats to national security. The petitioner, former Attorney General John Mitchell, maintained that he was entitled to qualified immunity because, at the time of the alleged conduct, it was not clearly established that his use of warrantless wiretaps for purposes of national security would violate a person's constitutional rights. *Mitchell,* 472 U.S. at 515. This Court ultimately held that "the legality of the warrantless domestic security wiretap Mitchell authorized in November, 1970, was, *at that time, an open question.*" *Id.* at 535. (emphasis added). This Court therefore upheld the proposition that decisions "clearly establishing" the relevant constitutional right should not be retroactively applied to public officials under a qualified immunity analysis. *Id.* at 535. In the instant case the First Circuit Court of Appeals therefore properly held that the "knock and announce" rule was not a clearly established constitutional right until the *Wilson* decision in 1995 and so could not be retroactively applied to the respondent's conduct.

The petitioner has also claimed that violations of state constitutional law and regulations should be considered a violation of a "clearly established" right pursuant to the qualified immunity analysis. However, this Court has previously held that a respondent's violation of state law or administrative regulations do not create a clearly established right so as to overcome the defendant's entitlement to qualified immunity. *Elder,* 127 L. Ed. 2d at 350. Similarly, in *Davis,* 468 U.S. at 193 the plaintiff alleged that the defendant's violation of Florida's statutory provisions governing removal of state employees' which had the force of state law, was prima facie evidence that the defendant's conduct was unreasonable. The plaintiffs in *Davis* alleged that "official conduct that contravenes the statute or regulation is not 'objectively reasonable' because officials fairly may be expected to conform their conduct to such legal norms." *Davis,* 468 U.S. at 193. In rejecting this argument, this Court held that "an official would not be held liable in damages under § 1983 unless the constitutional right he was alleged to have violated was "clearly established" at the time of the violation. . . . [O]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis,* 468 U.S. at 193. St. Hilaire's reliance upon such state and regulatory authorities as the Model Penal Code, the New Hampshire Supreme Court decision in *State v. Jones,* 127 N.H. 515 (1985) and New Hampshire R.S.A., 627:5, 11(b)(2) is misplaced and improper under this Court's opinions in both *Elder* and *Davis.* The lower court properly rejected St. Hilaire's claims based on those authorities and petitioner has failed to demonstrate that this issue should be reviewed anew by this Court in the face of its previous consistent pronouncements.

A. The lower courts did not err in holding that the factual dispute over whether adequate notice was given was immaterial as a matter of law.

The First Circuit found that there was a dispute of fact as to whether the police did identify themselves when they approached St. Hilaire. Although St. Hilaire asked shortly after the incident, "why didn't the police identify themselves", the respondents also produced significant evidence that identification and warnings were given to St. Hilaire during their approach. With respect to issues other than the respondent's entitlement to qualified immunity, the factual dispute noted above might have precluded the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). However, pursuant to the analysis established by this Court, the lower court was justified in summarily disposing of this case as it properly found that the right alleged to have been violated was not "clearly established" at the time of its alleged violation. The petitioner failed to demonstrate the existence of a "clearly established" right and respondents were therefore, entitled to qualified immunity as a matter of law. The lower courts were not obligated to attempt to address any alleged factual disputes as petitioner did not meet the threshold burden of proof of showing the existence of a "clearly established" right. Lower courts, consistent with precedent, need not evaluate factual disputes when, as a matter of law, the defendant is entitled to qualified immunity. *Elder v. Holloway*, 127 L. Ed. 2d 344, 350-51 (1994).

III.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS TO THE RESPONDENTS DUPUIS, COLLIS AND THE COUNTY OF BELKNAP AS THESE RESPONDENTS DID NOT USE EXCESSIVE OR DEADLY FORCE AGAINST THE PETITIONER.

The final argument which the petitioner presents as a basis for granting Writ of Certiorari is the issue of the application of qualified immunity to excessive force cases. Petitioner argues that the circuit courts have rendered confusing and conflicting opinions concerning whether qualified immunity can be used as a defense in excessive force cases.

The only excessive force allegations raised in this case have been directed against Detective David A. Gunter of the Laconia Police Department as a result of his use of his weapon. Petitioner did not allege below and does not allege here, that Dupuis, Collis or the County of Belknap used any force against Philip St. Hilaire. At the time St. Hilaire was shot, Deputy Sheriff Collis was approaching the scene from across the street. Deputy Sheriff Dupuis was approaching St. Hilaire behind Gunter and never discharged his weapon or used any other form of force against Mr. St. Hilaire. Therefore, respondents Dupuis, Collis and the County of Belknap request that if this Court is inclined to grant the Petition based solely upon the issue of whether qualified immunity can be raised as a defense to a claim of the use of excessive force, that the Petition be denied as to these respondents.

CONCLUSION

Wherefore, the respondent requests that this Court grant the following relief:

A. Deny the Petition for Writ of Certiorari;

B. Deny the Petition for Writ of Certiorari as to Respondents Dupuis, Collis and Belknap County;

C. Affirm the Judgment of the First Circuit Court of Appeals; and

D. Grant such other and further relief as this Court deems fair and just.

Dated: May 24, 1996

Respectfully submitted,

DONALD J. PERRAULT
Counsel of Record
WADLEIGH, STARR, PETERS,
DUNN & CHIESA
95 Market Street
Manchester, NH 03101
(603) 424-9792

CHRISTINE DESMARAIS-GORDON
WADLEIGH, STARR, PETERS,
DUNN & CHIESA
95 Market Street
Manchester, NH 03101
(603) 424-9792

Attorneys for Respondents Deputy Sheriff Robert Dupuis, Jr. Deputy Sheriff Daniel Collis, and County of Belknap